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ADVOCATE IN RESIDENCE

THE DEATH PENALTY AS THE ANSWER TO CRIME: COSTLY, COUNTERPRODUCTIVE AND CORRUPTING

Stephen B. Bright*

I appreciate the opportunity to make some remarks about capital punishment and about the crime debate in our country today. Unfortunately, what is called a crime debate is really no debate at all, but an unseemly competition among politicians to show how tough they are on crime by supporting harsher penalties and less due process. The death penalty and long prison sentences are being put forward as an answer to the problem of violent crime. This approach is expensive and counterproductive. It is corrupting the courts and diverting our efforts from the important problems of racial prejudice, poverty, violence and crime. It is not making our streets any safer.

* This transcript originally appeared in volume 35, number 4. However, numerous inadvertent errors appeared. We apologize to Stephen Bright on behalf of the editors of volume 35. The corrected transcript appears here.

Stephen Bright has been director of the Southern Center for Human Rights since 1982, and has represented persons facing the death penalty at trials, on appeals, and in post-conviction proceedings since 1979. He has taught courses on the death penalty at the law schools of Florida State, Harvard, and Yale Universities, and has been a regular faculty member at the Bryan R. Shechmesiter Death Penalty College, a week-long, intensive program for lawyers involved in the trial of capital cases, which is held at Santa Clara University School of Law each August. He served on an American Bar Association Committee that studied the capital punishment process and has testified on capital punishment issues before committees of the U.S. Senate and House of Representatives, as well as several state legislatures.

Stephen Bright was selected as the 1995 Distinguished Advocate in Residence at Santa Clara University School of Law. On February 16, 1995 he addressed the students, faculty, alumni, and members of the community about the death penalty as the answer to crime. The following is a transcription of his remarks.

The power of government is increasingly being used to wage class warfare top down against the poorest and the most powerless people in our society: immigrants, women and children who are on welfare, and those who are accused of crimes. These people have no lobby and no ability to influence legislation or the decisionmakers in government. They have no political action committee. Unlike Rupert Murdock, they cannot drop by and meet with the Speaker of the U.S. House of Representatives while he is contemplating a book deal. Their only protection against the passions of the moment is the Bill of Rights.

The Bill of Rights is becoming a casualty of the war on the poor. There has been very little discussion of the consequences to our society. The United States Congress, in the first one hundred days after the Republican takeover with the "Contract with America," behaved much like the legislatures in Georgia or Alabama, where bills are often passed without hearings, without a great deal of opposition, without much debate, and without the members being informed about what they are voting on.

In the discussion of crime measures, the Bill of Rights is dismissed as nothing more than a collection of "technicalities" which burden law enforcement. The war against drugs has all but eliminated the Fourth Amendment's protection from unreasonable searches and seizures from the Constitution. Police departments and law enforcement agencies all across the country have become corrupted, but we have very little to show for this effort in terms of having reduced the amount of drug use in this society. Now, those who profess to be our leaders are talking about a broader war, the war on crime, that will be waged at a much greater cost.

I. DEMAGOGUERY ON CRIME IN AMERICAN POLITICS

Before the Cold War, politicians would accuse each other of being "soft on Communism." In some parts of the country, a politician could not be "soft on Communism" — whatever that meant — and remain in office. But now that Communism has collapsed, the new code word in politics is crime. One cannot be soft on crime. Crime, like Communism, is something that everyone is against. But the overly simplistic litmus tests for determining whether a public official is "soft"

do not always result in the most thoughtful or best approaches to preventing crime in our society.

Crime began to emerge as a potent weapon of political demagoguery with Richard Nixon's acceptance speech to the 1968 Republican Convention. He promised that if he was elected President of the United States, we would have a new Attorney General. Ramsey Clark, the Attorney General, was blamed for crime.

Lee Atwater later urged Republicans running for office to stress the crime issue because many Democrats were opposed to capital punishment. George Bush's campaign may have established the low water mark in 1988 with his advertisements featuring Willie Horton, who committed a rape while on furlough from a prison in Massachusetts.

Not nearly as noticed, but equally as sad, was the scheduling of the execution of a brain damaged man by the Governor of Arkansas and Presidential candidate Bill Clinton right before the New Hampshire primary in 1992.¹ Clinton flew back to Arkansas to make a show of denying clemency for Ricky Ray Rector, an African-American sentenced to death by an all-white jury for the murder of a white police officer. After shooting the officer, Rector had put the gun up to his own head and shot out the front part of his brain.

By the time of his execution, Rector had grown to some 300 pounds. In the days before his execution, Rector barked at the moon, laughed inappropriately, and said he was going to vote for Clinton for President. Rector had the habit of saving his dessert after dinner every night and eating it later. Bill Clinton came back to Arkansas, and with much fanfare presided over the execution of Ricky Rector. It was discovered later that night that Ricky Rector had put aside his pecan pie. He had so little appreciation of what death meant that he thought he was going to come back that evening after the execution and finish off his dessert.

The politicizing of the death penalty has been seen in political campaigns in Texas, where four years ago the attorney general and the governor argued about who was most responsible for the executions that had taken place. The biggest applause lines for the new Governor of New York, George Pataki, and the new attorney general were their

1. The execution of Ricky Rector and Bill Clinton's role in it are described in Marshall Frady, *Death in Arkansas*, NEW YORKER, Feb. 22, 1993, at 105.

promises to reinstate the death penalty in New York and send a prisoner, Thomas Grasso, to Oklahoma where he could be executed.² What possible effect on the lives of New Yorkers was it going to have to take this man, Thomas Grasso, and send him back to Oklahoma, so Oklahoma could put him to death? And yet, it seemed to be the most important thing the new governor and attorney general could do for New York.

With the demands for death from every quarter has come a much greater acceptance of the death penalty in this country than would have seemed possible several years ago. In 1987, the case of *McCleskey v. Kemp*³ was argued before the United States Supreme Court. From the argument, it appeared that the Court might do something about the rank racial disparities in imposition of the death penalty. Unfortunately, however, by a five-to-four vote, the Court, in *McCleskey*, allowed Georgia to continue to carry out the death penalty despite those racial disparities. In an opinion by Justice Lewis Powell, the Court held that it did not matter that a person who is accused of the murder of a white person is four times more likely to get the death penalty than someone accused of the murder of an African-American.⁴

We now know from Thurgood Marshall's papers that Justice Scalia was convinced by the evidence that race played a role in the imposition of the death penalty in Georgia.⁵ Nevertheless, he ultimately voted to affirm anyway. Justice Powell, now retired from the Court, told his biographer that the vote he regrets the most on the Supreme Court was that key fifth vote affirming *McCleskey*.⁶

The same day that *McCleskey v. Kemp* was argued at the Supreme Court, the Senate voted on a crime bill that contained death penalty provisions. There were not enough votes in the Senate in 1987 to close debate and enact a federal death penalty. But the next year, 1988, was an election year

2. John Kifner, *A Distant State Watches a Killer Waiting to Die*, N.Y. TIMES, Mar. 19, 1995, at A37.

3. 481 U.S. 279 (1987).

4. *McCleskey*, 481 U.S. at 279.

5. David C. Baldus, *Symposium: The Capital Jury Project, Keynote Address: The Death Penalty Dialogue Between Law and Social Science*, 70 IND. L.J. 1033, 1040 (1995).

6. JOHN C. JEFFREYS, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 451 (1994).

and the Anti-Drug Abuse Act passed with one death penalty provision in it, the so-called "drug king pin" provision. But the death penalty was limited to homicide cases committed by "drug king pins" where major drug transactions were involved.

By 1994, there seemed to be no limit on death. The Democrats took back the crime issue with Clinton's execution of Ricky Rector before the New Hampshire primary, and took back the White House the following November. The only competition between the two political parties on the issue of crime was to see which could be tougher than the other. The death penalty was provided for over fifty federal offenses in the Violent Crime Control and Law Enforcement Act of 1994,⁷ signed into law by President Clinton in September. Nevertheless, many Republicans opposed the law and complained that the bill was not tough enough.

And now, those who authored the "Contract with America" and took control of Congress in January of 1995 have promised even more use of the death penalty and that they will cut back on what little federal habeas corpus review remains. One bill would make it easier to impose the death penalty in federal cases by not disclosing to the jury the alternative sentence. Although the once great Writ of Habeas Corpus has been virtually destroyed by procedural barriers imposed by the Supreme Court under the leadership of William Rehnquist in the last fifteen years,⁸ the Republicans

7. Pub. L. 103-322, 105 Stat. 1976 (1994).

8. The Court has limited the availability of the writ to vindicate constitutional rights by adopting strict rules of procedural default, *see, e.g.*, *Smith v. Murray*, 477 U.S. 527, 533-36 (1986); *Engle v. Isaacs*, 456 U.S. 107, 130-34 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 88-91 (1977); *Timothy J. Foley, The New Arbitrariness: Procedural Default of Federal Habeas Claims in Capital Cases*, 23 *LOY. L.A. L. REV.* 193 (1989); by excluding most Fourth Amendment claims from habeas corpus review, *see Stone v. Powell*, 428 U.S. 465 (1976); by requiring deference to fact finding by state court judges, *see, e.g.*, *Patton v. Yount*, 467 U.S. 1025 (1984); *Sumner v. Mata*, 449 U.S. 539 (1981), *after remand*, 455 U.S. 591 (1982), *after second remand*, 464 U.S. 957 (1983); by making it more difficult for petitioners to obtain an evidentiary hearing to prove a constitutional violation, *see Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992); by adopting an extremely restrictive doctrine regarding the retroactivity of constitutional law, *see Teague v. Lane*, 489 U.S. 288 (1989); *James S. Liebman, More than "Slightly Retro": The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in Teague v. Lane*, 18 *N.Y.U. REV. L. & SOC. CHANGE* 537 (1991); by reducing the harmless error standard for constitutional violations recognized in federal habeas review, *see Brecht v. Abrahamson*, 507 U.S. 619 (1993); and by

want to do more to limit the ability of the federal courts to correct constitutional violations. The Senate has passed a bill that would prevent federal courts from granting relief in habeas corpus cases unless the state court's legal conclusions were "arbitrary and unreasonable."⁹

Part of the war on crime is to be tough on the prisoners of that war. The U.S. House of Representatives has passed a bill which, like so many proposals that are part of the "Contract with America," has an Orwellian title to disguise its true purpose. It is called the "Stop Turning Out Prisoners Act." This bill would strip the federal courts of much of their ability to remedy unconstitutional conditions in prisons and jails. The discussion of the proposal was typical of the very uninformed debates that occur today with regard to crime. Some spoke of prisoners claiming in lawsuits that their ice cream had melted and other frivolous matters. No one talked about the people in prisons and jails who have been sexually assaulted, killed, or disfigured for life because of conditions in America's overcrowded prisons and jails.

Two weeks ago, I was at a county jail in McDuffie County, Georgia, which had capacity for thirty-seven prisoners, but was housing over 100. People were sleeping on the floors and sleeping where toilets were overflowing into where they slept.

I recall being in one such jail with a very conservative federal judge, whose only qualification for the federal bench had been that he had given a lot of money to a Senator's campaign. He had shown his hostility to prisoners in numerous previous cases. But after he toured the jail, he told the head of the county commission, "you wouldn't spend one hour in this place and you have people living here twenty-four hours a day." The Chairman of the County Commission responded that it was just too expensive to put the people in other jails

restricting when a constitutional violation may be raised in a second habeas petition, see *McCleskey v. Zant*, 499 U.S. 467 (1991).

9. The Comprehensive Terrorism Prevention Act of 1995, S. 735, 104th Cong., 1st Sess. (1995), passed by the Senate, requires deference by federal courts to decisions of state courts unless the decision is "contrary to, or involved an unreasonable application of, clearly established Federal law," *id.* § 604(3), establishes a statute of limitation for the filing of habeas corpus petitions, *id.* § 601, further restricts when a federal court may conduct an evidentiary hearing, *id.* § 604(4), and adds new barriers to hearing a successive habeas corpus petition, *id.* § 605. See David Cole, *Destruction of the Habeas Safety Net*, *LEGAL TIMES*, June 19, 1995, at 30.

in nearby counties. The judge replied, "That's why we have federal courts."

If Congress removes even the little power that federal courts have to correct grossly inhumane conditions of confinement, there will be no place for those languishing in such places to turn. The county commissions and the state legislatures are not going to worry about overcrowding in prisons and jails, inadequate staffing of those institutions, lack of medical care for prisoners or other deficiencies. They will not worry about violence until the violence becomes riots and guards are injured. The only protection that inmates have from the indifference of those in power is the protection of the Bill of Rights and the federal courts.

Politicians at the state level are equally anxious to demonstrate that they are not "soft on crime," no matter what the economic or social cost. "Three strikes, you're out" was a good sound bite, so it has become the crime policy of a number of states at enormous cost in prison space and congestion in the courts. Georgia — always on the cutting edge in these matters — recently passed a constitutional amendment providing for "two strikes and you're out," life imprisonment after two violent felonies. Governor Pete Wilson of California was at one time proposing "one strike and you're out." Fortunately, these people were not around when baseball was being developed or there would be some very short evenings at Candlestick Park.

II. THE DARK SIDE OF THE AMERICAN SPIRIT

Thurgood Marshall once said that the measure of a country's greatness is its ability to retain its compassion in times of crisis. Under that test, we are not measuring up. We are not showing compassion for the poor, for immigrants, or for the disadvantaged in our society.

The cheering that accompanies executions is a troubling indication of our lack of compassion. Celebrations occurred after the execution of my client James David Raulerson at the Florida State Penitentiary in 1985. He was sentenced to death for the murder of a police officer in Jacksonville. Within moments of his being pronounced dead, some of the police officers in the witness room slapped the father of the victim on the back and congratulated him and pumped his hand as if someone had just scored a touchdown. When I

walked out of the prison there was a group of police officers selling T-shirts that had on them a picture of the electric chair and the words, "Crank Up Old Sparky." There was a big celebration going on and I stopped to observe it. While I was standing there, the hearse with my client in it drove by on the way to the funeral home. A cheer went up from the crowd.

When executions are carried out in Huntsville, Texas, the fraternities turn out and have beer parties. In Virginia, after one of my clients had been executed, I left the prison and saw the fraternities partying. Signs were displayed saying "turning up the juice" and "give him more." In Georgia, some of the bars have beer parties when someone is executed.

The celebrations of death are only one example of how the death penalty brings out the dark side of the American spirit. We do not see our society at its best when we are celebrating the death of any individual, regardless of who the person is or what he or she may have done. Some people argue that we are too civilized in this country for capital punishment. But, based on what I see, I have serious doubts of whether we are civilized enough.

The Milwaukee County District Attorney, E. Michael McCann, who prosecuted Jeffrey Dahmer for a series of gruesome murders in 1991, made some very unusual and very impressive remarks after Dahmer was stabbed to death in 1994 in a Wisconsin prison. McCann observed that Dahmer's parents "will have to experience the same loss the families of his victims have experienced."¹⁰ He found this widening of the circle of violence and suffering — what he called "the last sad chapter in a very sad life . . . tragic."¹¹ Mr. McCann recognized something that many Americans seem not to realize, that even the death of Jeffrey Dahmer was not something to celebrate.

But instead of calling upon us to reflect, most prosecutors and other public officials exploit the victims of crime and the death penalty for political gain by stirring up and pandering to fears of crime. The policies that are resulting from this approach are costing our society a tremendous price in money, in the corruption of the judiciary, and in diverting

10. Don Terry, *Jeffrey Dahmer, Multiple Killer, Is Bludgeoned to Death in Prison*, N.Y. TIMES, Nov. 29, 1994, at A1.

11. *Id.*

millions of dollars from education, drug programs, community policing and other measures that would actually help prevent crime.

III. COURTS THAT FOLLOW THE ELECTION RETURNS, NOT THE LAW

California provides a classic example of what such emphasis on the death penalty can do to the courts. Governor George Deukmejian, after he had already come out against the retention of Chief Justice Rose Bird on the California Supreme Court, threatened that if two other members of the court did not change their votes in capital cases, he would campaign against their retention as well. To their credit, they did not change their votes. The governor carried out his threat and in 1986, three justices were voted off the court. Governor Deukmejian appointed their replacements, who have given the voters what they wanted. The California Supreme Court, which had been one of the most distinguished state supreme courts in the country, is now an undistinguished death mill known only for its various refinements of the harmless error doctrine.¹²

This example has been followed in Mississippi, Texas and other states where judges have been voted off the bench upon accusation that they were "soft on crime" and replaced with judges who would give the voters what they want.¹³

Judges are not like legislators. Their responsibility is not to follow the election returns, but to follow the law. But justices and judges are unlikely to follow the law in high profile capital cases when by doing so they are signing their own political death warrants. As justices and judges are voted off the bench in California and other states, the fairness and in-

12. See Elliot C. Kessler, *Death and Harmlessness: Application of the Harmless Error Rule by the Bird and Lucas Courts in Death Penalty Cases — A Comparison & Critique*, 26 U.S.F. L. REV. 41, 85, 89 (1991) (observing that the new court has "reversed every premise of the Bird Court's harmless error analysis," displaying an eagerness to find error harmless that reflects "jurisprudential theory" less than a "desire to carry out the death penalty").

13. Stephen B. Bright and Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 760-765, 784-792 (1995).

tegrity of the judicial system is becoming a casualty of the war on crime.¹⁴

IV. THE FAILURE TO ENFORCE THE RIGHT TO COUNSEL

One of the most egregious and consistent failures of the judiciary to enforce the law has been with regard to the Sixth Amendment's right to counsel.¹⁵ There are at least three people condemned to die in Texas who were represented by court-appointed lawyers who slept at times during the trials at which their clients were sentenced to death. In one case, a judge in Houston said, "the Constitution guarantees you a right to counsel, but the Constitution does not say that the lawyer has to be awake."¹⁶ If one of these people is executed, it will not be anything out of the ordinary — it probably will not even make the news — because Texas executes so many people now that it has become routine.

Equally shocking examples of deficient representation can be found in other states where the death penalty is imposed. Jack House was sentenced to death in a Georgia trial in which his lawyer was parking his car while one of the state's witnesses testified on direct; yet he cross-examined the witness whose direct testimony he had never heard.¹⁷ Judy Haney was represented at her capital trial in Alabama by a lawyer who came to court so drunk one morning during the trial that the judge had to send the jury out and had to send the lawyer to jail for the day. The next morning, the judge produced both the lawyer and the client from jail and resumed the capital trial, and the death penalty was imposed.¹⁸

14. For further discussion of the impact of the crime debate on the judiciary in states where judges are elected, see *id.* at 792-833.

15. For a more comprehensive discussion of the problems of deficient representation in capital cases, and the reasons for it, see Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

16. John Makeig, *Asleep on the Job: Slaying Trial Boring, Lawyer Said*, HOUS. CHRON., Aug. 14, 1992, at A35. See also Paul M. Barrett, *On the Defense*, WALL ST. J., Sept. 7, 1994, at A1 (describing lawyer Joe Frank Cannon, who is appointed to criminal cases in Houston and was alleged to fall asleep during death penalty trials; ten of his clients have been sentenced to death).

17. *House v. Balkcom*, 725 F.2d 608, 612 (11th Cir.), *cert. denied*, 469 U.S. 870 (1984).

18. Record at 846-49, *State v. Haney*, 603 So. 2d 368 (Ala. Crim. App. 1991), *aff'd*, 603 So. 2d 412 (Ala. 1992), *cert. denied*, 507 U.S. 925 (1993).

Billy Birt was represented, over his objection, in a trial in Georgia. Birt knew that the lawyer did not care about him and asked for a new lawyer. But the trial judge, reasoning that he was paying the lawyer, and not Birt, refused to discharge the lawyer. The lawyer did not object to the intentional underrepresentation of African-Americans in the jury pools in the county. When evidence of the exclusion of African-Americans from jury pools was presented in federal review of the case, the federal court refused to review the ruling, finding the issue had been waived because the lawyer had not preserved it.¹⁹

This lawyer was later asked to name all the criminal law opinions from any court with which he was familiar. He thought about it for a minute and he said, "well, there's the *Miranda* decision. Everybody knows the *Miranda* decision. And there's the *Dred Scott* decision."²⁰ Those were the only two criminal cases he could name. It was no wonder he had not raised a challenge to the underrepresentation of African-Americans in the jury pools. He was not aware of the Supreme Court decisions that held such discrimination to be a violation of the Sixth and Fourteenth Amendments of the United States Constitution. And yet, elected trial judges in Georgia have appointed that lawyer to case after case, to defend people accused of crimes and to defend people facing the death penalty.

I became involved in capital punishment work in 1979 after volunteering to handle a case pro bono and receiving the record of a death penalty case in Georgia that was about one and a half inches thick. I will never forget calling the American Civil Liberties Union in Georgia and saying "surely this is not the record, an inch and one half thick, in a death penalty case. It couldn't be." At the time, I was supervising law students in a law school clinic. We produced larger records than that in shoplifting cases.

I read the record that night. It was remarkable. The lawyer did almost nothing. He gave a quick opening state-

19. *Birt v. Montgomery*, 725 F.2d 587 (11th Cir.), *cert. denied*, 469 U.S. 874 (1984)

20. Transcript of Hearing of Apr. 25-27, 1988, at 231, *State v. Birt* (Sup. Ct. Jefferson County, Ga.) (No. 2360). The lawyer referred to *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Dred Scott v. Sandford*, 60 U.S. 393 (1857). *Dred Scott* was not a criminal case.

ment. He did not cross examine much. He did not put on any evidence. The next day, I mentioned to a colleague at the clinic that our students tried shoplifting cases better than this death penalty case had been tried.

I did not realize that, by the standards that are accepted in capital cases, the lawyer had done a good job in that case. At least he did not use a racial slur to refer to his client. I have since seen five cases in which defendants were referred to with a racial slur by their own court-appointed lawyers, the lawyers who supposedly were defending them. The lawyer in that first case I saw did not fall out of his chair at any time during the trial as did the lawyer who supposedly defended Charlie Young at Young's capital trial in Georgia.

The lawyer in that first case knew that a capital trial is bifurcated into two trials, one on guilt and one for sentencing, although he did almost nothing at either phase. Since then, I have seen several cases where the lawyer was not aware that capital trials are bifurcated. In a recent capital case in Alabama, the defense lawyer asked the judge for a few minutes before the penalty phase so that he could read the death penalty statute.

A short time after taking that first case, I went to Georgia to meet the client. He was an eighteen-year-old African-American suffering from schizophrenia who was totally out of touch with reality. The jury that had sentenced him to death had not been told that he was schizophrenic. In fact, the jury knew nothing about him.

I found it troubling that one could be sentenced to death in such a perfunctory process, and with such deficient legal representation. How could the jury possibly decide whether a person should live or die if it had no information about the person? I agreed to take some other cases. The more I saw, the more amazed I was at what is allowed to go on in the courts of this land in capital cases.

For example, the only time George Dungee's lawyer ever said anything about his client in the whole trial was when he said to the jury in closing argument, "what we've got here, ladies and gentlemen, is a little 138-pound nigger man that probably doesn't have an I.Q. over eighty."²¹ If the lawyer

21. Transcript of Opening and Closing Arguments at 39, *State v. Dungee*, Record Excerpts at 102 (11th Cir.) (No. 85-8202), *decided sub nom.* *Isaacs v. Kemp*, 778 F.2d 1482 (11th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986).

had done any investigation, he would have found that George Dungee's I.Q. in fact was sixty-five, that he could not make change, and he could not drive a car. But none of that was presented to the jury. His lawyer just took a guess at his I.Q. during closing argument.

This type of representation does not occur just in Alabama, Georgia, and Texas. In one California case, the defense lawyer was stopped on the way to court and it was found that his blood alcohol level was so high that he could not operate a motor vehicle. The California Supreme Court concluded that it did not mean he rendered ineffective assistance of counsel.²²

A study by the *Philadelphia Inquirer* disclosed the poor level of representation in capital cases in Philadelphia.²³ The *Inquirer* looked at twenty cases where the death penalty had been imposed and found that in only eight had there been any investigator for the defense. And in only two had funds been authorized for expert witnesses — psychologists costing \$400 in one case and \$500 in the other. People who worked in the court system in Philadelphia were quoted as saying that they would not want to be represented in traffic court by the lawyers appointed to death penalty cases.

The U.S. Court of Appeals for the Third Circuit recently reversed a finding of ineffective representation in a Pennsylvania case where the defense lawyer tailored his presentation of evidence and argument around a death penalty statute that had been declared unconstitutional *three years earlier* because it limited the arguments on which the defense could rely as to mitigating circumstances.²⁴ Is it requiring too much of lawyers to expect them to figure out what statute their client is being tried under?

The promise of *Gideon v. Wainwright*²⁵ remains unfilled over thirty years after that case was decided. Clarence Earl Gideon was convicted of a felony at a trial in which he was not represented by counsel. He filed his own petition to

22. *People v. Garrison*, 765 P.2d 419 (Cal. 1989).

23. Fredric N. Tulsky, *What Price Justice? Poor Defendants Pay the Cost as Courts Save on Murder Trials*, PHILA. INQUIRER, Sept. 13, 1992, at A1; Fredric N. Tulsky, *Big-Time Trials, Small Time Defenses*, PHILA. INQUIRER, Sept. 14, 1992, at A1.

24. *Frey v. Fulcomer*, 974 F.2d 348 (3d Cir. 1992), cert. denied, 507 U.S. 954 (1993).

25. 372 U.S. 335 (1963).

the United States Supreme Court seeking the right to counsel. The Supreme Court held that there was a right to counsel in felony cases and remanded the case to the Florida courts for trial with counsel. Gideon was acquitted at his retrial.

In his marvelous book about the case, *Gideon's Trumpet*,²⁶ Antony Lewis wrote that bringing to life the holding of the *Gideon* decision — providing every person charged with a crime a capable defense lawyer — would be an enormous challenge. Unfortunately, many jurisdictions have resisted the holding of *Gideon* instead of accepting the challenge.

The Sixth Amendment right to counsel is viewed as an unfunded federal mandate which the states are free to ignore. The result is deficient representation, and the result of deficient representation is that courts and juries do not get information that they need to decide guilt or innocence or the proper punishment. In addition, as a result of poor representation by lawyers who do not know the law, the fundamental guarantees of the Bill of Rights are often ignored in capital trials.

Gary Nelson spent eleven years on death row in Georgia, convicted on the basis of a crime laboratory expert who testified that a hair found on the victim's body had come from Gary Nelson. Nelson was represented by a lawyer who was paid \$20 an hour and provided no money for an investigator or an expert. After Nelson had spent years on death row awaiting electrocution, it was discovered that the Federal Bureau of Investigation had examined the hair and concluded that because it was a chest hair, it did not have sufficient characteristics for microscopic comparison.²⁷ If Gary Nelson's lawyer had consulted with anyone who knew anything about hair comparison, if he had been provided funds for his own independent expert, Gary Nelson would not have spent eleven years on death row.

It is not unusual for a death sentence to be imposed upon a mentally retarded or mentally ill person by a jury that knows nothing about the mental impairments of the accused. Death sentences imposed after such trials have recently been carried out in Alabama, Louisiana, and Texas. In each of these cases, and countless others, the jury was unable to per-

26. ANTHONY LEWIS, *GIDEON'S TRUMPET* (1964).

27. *Nelson v. Zant*, 405 S.E.2d 250, 252 (Ga. 1991).

form its constitutional obligation of making a fair and reliable determination of guilt, or a reasoned moral decision with regard to punishment because of the deficient representation provided the accused.

Inadequate representation may also leave those most in need of the protections of the Bill of Rights without any protection at all. An example is John Eldon Smith, the first person executed in Georgia. He was one of three people involved in two murders in Macon, Georgia. Smith had the misfortune of being represented by lawyers who were not aware of U.S. Supreme Court decisions holding that the exclusion of women from juries violates the Constitution, and his lawyers did not challenge the exclusion of women practiced in that county at the time of Smith's trial. The lawyers for one of Smith's co-defendants did know the law. The issue was raised, although it was rejected by the Georgia courts. The third defendant in the case exchanged testimony against the other two for a lighter sentence. The two defendants who went to trial were sentenced to death.²⁸

Several years later when the cases made their way to federal court and were reviewed by judges who were serving life tenure — not judges who had to face the Georgia electorate every few years as superior court judges in Georgia do — it was a simple application of the law to the facts. A new trial was ordered in the co-defendant's case.²⁹ When the co-defendant was tried before a jury that fairly represented the community, a life sentence was imposed.³⁰

But John Eldon Smith did not get a new trial before a jury that fairly represented the community, even though the jury that sentenced him to death had been drawn from the same unconstitutional jury pool as was the jury for his co-defendant. The federal court of appeals held that because Smith's lawyers did not raise the issue before trial, it had been waived.³¹ Smith was executed. If Smith had been represented by the lawyers who represented his co-defendant, he would be alive today. By the same token, if his lawyers had

28. *Smith v. Kemp*, 715 F.2d 1459 (11th Cir.), *cert. denied*, 464 U.S. 1003 (1983).

29. *Machetti v. Linahan*, 679 F.2d 236 (11th Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983).

30. *Smith*, 715 F.2d at 1476.

31. *Id.* at 1469-72.

represented the co-defendant, they would have waived the issue in that case and the co-defendant would be dead today.

Fifteen years ago, many people would have considered it unthinkable to execute someone who was sentenced to death in violation of the Bill of Rights. Today, it routinely happens in case after case. Although the death penalty was upheld by the Supreme Court in 1976, based in part on the promise that state supreme courts would search the record for constitutional error whether it had been raised or not, today courts search through the records not to find error, but to find a procedural basis on which to avoid the vindication of constitutional rights.

One of the significant moral issues related to the death penalty is whether it is fair and morally right to give a poor person accused of a crime a bad lawyer — a lawyer who does not care about the client, a lawyer who may be insensitive to the client's race, poverty or mental limitations, a lawyer who receives so little compensation that it is impossible to devote the time required to prepare the case, a lawyer who is not provided with the expert witnesses or the investigative assistance necessary to prepare for trial and mount a defense — and then, attribute all of the failings of the lawyer to the client, who had no voice in his selection or may have even objected to the lawyer. Billy Birt said he did not want the lawyer assigned to him, but it was Billy Birt, not the lawyer, who paid for the lawyer's ignorance of the law when the federal courts refused to correct the constitutional violation. John Eldon Smith paid with his life for his lawyer's ignorance of the law.

V. THE TOLERANCE OF RACIAL DISCRIMINATION

Wiley Dobbs was sentenced to death in Walker County, Georgia, a community south of Chattanooga, Tennessee. Dobbs was tried by a judge who had been a segregationist in the legislature and called Dobbs by his first name. The judge called him "boy" and "colored" during the trial as did the prosecutor.³² Dobbs had a hapless court-appointed lawyer. Questioned in post-conviction proceedings about his racial attitudes, the lawyer expressed his belief that African-Americans

32. *Dobbs v. Zant*, 720 F. Supp. 1566, 1570 (N.D. Ga. 1989), *aff'd*, 946 F.2d 1519 (11th Cir. 1991), *rev'd on other grounds and remanded*, 506 U.S. 357 (1993).

make good basketball players but not good teachers, that when you hire an African-American you do so with the knowledge that they will steal, and that he used the term "nigger" jokingly.³³

At the penalty phase of Wiley Dobbs' trial, the lawyer put on no evidence about his life or his background. He told the jury nothing about the man whose life was in their hands. For a closing argument at the penalty phase, he read part of Justice Brennan's concurring opinion in the case of *Furman v. Georgia*,³⁴ the 1972 case that declared the death penalty unconstitutional. The jury had a man's life in its hands. To read an opinion that says the death penalty is unconstitutional and will not be carried out is not much of a trial strategy, particularly in Walker County, Georgia, where most people strongly favor the death penalty.

A federal district court held that the lawyer's racism did not matter because the lawyer did not sentence Dobbs and there was no showing that the lawyer's racism affected his performance as counsel.³⁵ This case shows how indifferent courts are to racial discrimination.

The criminal justice system is the part of our society that has been the least affected by America's civil rights movement. As I go around the South — particularly in the states where I practice, Mississippi, Alabama and Georgia primarily, which have substantial African-American populations — I see the diversity of the population reflected in those working at the hospitals, at the schools, and at many other institutions. Things are still not where they should be, particularly the schools, but some change has been made in the last thirty years. But at the courthouses around the South, nothing has changed. One still sees white judges and white prosecutors and white defense lawyers and, amazingly, all-white juries, even in communities that often have thirty to forty percent African-American populations.

It is absurd to think that a lawyer's racism has no effect on his performance. A lawyer's duty at the penalty phase of a capital trial is to tell the jury everything about the life and background of the client. The responsibility of the lawyer is

33. *Id.*

34. 408 U.S. 238 (1972).

35. Dobbs v. Zant, No. 4:80-CV-247-HLM (N.D. Ga. 1994) (Order of July 29, 1994).

to walk a mile in the shoes of the client, to see who he is, to get to know his family and the people who care about him, and then to present that information to the jury in a way that can be taken into account in deciding whether the client is so beyond redemption that he should be eliminated from the human community. That job cannot be done by a lawyer whose racial prejudice causes him to believe that his client is inferior or subhuman or would only make a good basketball player.

The case of Wiley Dobbs shows again the extent to which the courts have denigrated the right to counsel. Anyone with a fifth grade education can show up and listen to the other side's evidence and read a portion of Justice Brennan's concurring opinion in *Furman*. A twelve-year-old child can do that. We now have federal case law that says that is good enough *for the defense of a capital case*.

Courts tolerate racial discrimination in capital cases and in the criminal justice system that would not be tolerated in any other area of American life. Albert Jefferson, a mentally retarded African-American was sentenced to death by an all-white jury in Chambers County, Alabama. At the time of Jefferson's trial, the marriage licenses were kept in books engraved with the words "white" and "colored" in the clerk's office. The prosecution had used twenty-six jury strikes against twenty-six African-Americans in Jefferson's case. As a result, not a single member of Jefferson's race served on the juries that found him mentally competent for trial, guilty of murder and sentenced him to death.

The use of twenty-six jury strikes against twenty-six African-Americans is a very damning statistic. Either there was racial discrimination or it was an amazing coincidence that the prosecutor found all twenty-six African-Americans but not a single white worthy of a peremptory jury strike. But lists of the prospective jurors which were found in the prosecutor's file revealed even more about the purpose behind those strikes.

The prosecutor had divided prospective jurors up into four lists, apparently in accordance with his perception of whether they would be desirable jurors for the State. One list was marked "strong," another was marked "medium," another was marked "weak," and one list was marked "black." The last list contained the names of all of the African-Ameri-

can jurors. And, of course, those on the "black" list were the people he struck. Yet, the locally elected judge held that there was no racial discrimination in the exercise of those twenty-six strikes.³⁶

It is remarkable what one finds in courthouses. A Georgia lawyer once found a page from a yellow legal pad with a bunch of numbers scribbled on it in the clerk's office in Putnam County. He did not know what it meant. He asked the clerk, who did not know any better than to tell him that it was a memorandum from the district attorney to the jury commissioners telling them how many black people to put in the jury pools. In the memorandum, the district attorney had instructed the commissioners to underrepresent the black people by just enough to avoid a *prima facie* case under court precedents.³⁷ One wonders how many such lists and memoranda are never found.

Ed Peters, the district attorney in Jackson, Mississippi, publicly said in the newspaper and later under oath in a deposition that it is his policy in exercising his discretionary jury strikes to "get rid of" as many black people as possible.³⁸ That is how a government official selects a jury. In the case of Leo Edwards, an African-American, Peters obtained an all-white jury in accordance with this practice. Neither the state nor federal courts found this to violate the Constitution, and Leo Edwards was executed.³⁹

What other government official or entity — such as a school, a housing authority, or an employer — would be allowed to divide applicants into four categories of strong, medium, weak and black, and then eliminate all of one group based upon race? It was permitted in a death penalty case. It is equally difficult to imagine that a public official in any other area of life could have a policy of "getting rid of" people based upon their race upheld by the courts.

36. *State v. Jefferson*, No. CC-88-77 (Cir. Ct. Chambers County, Ala., 1992) (Order of Oct. 2, 1992), *rev'd on other grounds*, 645 So. 2d 313 (Ala. Crim. App. 1994).

37. *Amadeo v. Zant*, 486 U.S. 214 (1988) (ordering that Amadeo be given habeas corpus relief because of the intentional racial discrimination directed by the prosecutor). Both the Georgia Supreme Court and the United States Court of Appeals for the Eleventh Circuit denied Amadeo relief despite the prosecutor's intentional, race-based rigging of the jury.

38. *Edwards v. Scroggy*, 849 F.2d 204, 207 (5th Cir. 1988).

39. *Id.*

Georgia has executed eighteen people; twelve were African-Americans. Seven of the ten executed in Alabama were African-American. In Mississippi, three out of the four executed have been black. Although black people are the victims of sixty-five percent of the murders in the South, eighty-five percent of those sentenced to death are there for murders involving white victims.

The federal government has been even worse than the states in failing to prevent racial discrimination in the infliction of the death penalty. Under the Anti-Drug Abuse Act of 1988, the federal government has prosecuted thirty-seven death penalty cases. All but four have been against racial minorities. The first ten capital prosecutions approved by Attorney General Janet Reno were against African-Americans.⁴⁰ Ten for ten. Even in Alabama we do not see this kind of racial disparity.

Yet despite the pronounced racial disparities documented by many observers,⁴¹ both state and federal courts have been completely unwilling to deal with the influence of racial prejudice on the imposition of the death sentence. Courts avoid even mentioning the issue whenever possible and, while professing their commitment to eliminating the influence of racial prejudice on the process, deny relief by setting unreasonable burdens of proof, impossible legal standards, and wholly inadequate remedies.⁴²

VI. THE RISK OF ERROR IN DETERMINING GUILT OR PUNISHMENT

There are limits on what can reasonably be expected of courts. The judicial system provides a way of resolving disputes. Resolving disputes in court is better than fighting duels, but the courts are not infallible. There have been more than a few capital cases which illustrate the possibility of error in making the decision of guilt or innocence, a decision

40. *Racial Bias*, NAT'L L.J., Mar. 28, 1994, at A9.

41. See GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990) (reporting that an analysis of 28 studies found a "remarkably consistent" pattern of racial disparities in capital sentencing throughout the country).

42. For further discussion of the failure of the courts to deal with racial discrimination in the infliction of the death penalty, see Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433 (1995).

which is a far easier to make than whether a human being should live or die.

Kurt Bloodsworth was released after eight years from prison in Maryland where he had been sentenced first to death, and then to life imprisonment for murder and sexual assault of a child. He was released only because of the new developments in the science of DNA identification which allowed experts to analyze a tiny semen stain found on the panties of the victim and determine it was not left by Mr. Bloodsworth.⁴³ Clearly, someone else had committed the crime.

Walter McMillian spent six years on death row in Alabama for a murder committed in Monroe County, Alabama, where Harper Lee wrote *To Kill A Mocking Bird*. He was released after it was shown that he was at a fish fry in another county at the time the crime took place.⁴⁴

Fred Martinez-Macias, in Texas, was represented at trial by a court-appointed lawyer who was paid \$11.84 an hour. The U.S. Court of Appeals for the Fifth Circuit made the observation, which could be made in a lot of capital cases, that the criminal justice system got what it paid for.⁴⁵ The court set the conviction aside. When the case was put before a grand jury in El Paso, it did not even indict Martinez-Macias. He is a free man today.

Another person sentenced to death in Texas, Randall Dale Adams, was the defendant whose story was told in the motion picture *The Thin Blue Line*. Adams was found innocent and released from death row only because the prosecution turned over its files to some film makers who demonstrated his innocence. Clarence Brantley's innocence was shown, as was Walter McMillian's, by the CBS television program, *Sixty Minutes*. Brantley, McMillian, and Adams are free today not because of the legal system, but because of media attention.

That these innocent people were nearly executed should make us hesitate with regard to whether the death penalty should be used. Yet, the debate today is over how to speed up

43. Paul W. Valentine, *Jailed for Murder, Freed by DNA*, WASH. POST, June 29, 1993, at A1.

44. Peter Applebome, *Alabama Releases Man Held on Death Row for Six Years*, N.Y. TIMES, Mar. 3, 1993, at A1.

45. *Martinez-Macias v. Collins*, 979 F.2d 1067 (5th Cir. 1992).

the process, how to cut back on appeals, and how to have more executions.

And the tone of the debate has changed. The idea of executing innocent people was once unthinkable. But as it became increasingly clear that the system never has been and still is not capable of preventing execution of the innocent, it was argued that there is a war on crime and in any war, there are always some innocent casualties. That is a troubling argument.

But even more troubling is the argument made by a former prosecutor who acknowledged that innocent persons may be convicted as a result of "human frailty" or "prejudice, ignorance, neglect and occasional actual malice," but nevertheless asserted that "many persons who are wrongfully convicted may deserve serious punishment for many uncharged crimes that cannot be prosecuted for one reason or another."⁴⁶ Think about that. In the crime debate in America today, it is argued that it is acceptable to carry on executions because there are throw away people in our society who are guilty of something.

The Supreme Court of the United States almost allowed an execution to occur in the case of *Schlup v. Delo*,⁴⁷ in which there was a serious question about innocence based on a video tape showing that Schlup could not have committed the crime because he was somewhere else at the time it occurred. Four members of the United States Supreme Court thought it was more important to avoid confusion and prevent repetitive litigation than it was to correct that kind of injustice. Fortunately, five members of the Court voted the other way.

As difficult as the decision of guilt or innocence may be in some cases, capital cases call upon jurors and judges to make an even larger and more difficult decision in determining punishment. Whether someone should be eliminated from the human community is unlike the issues normally presented to juries at civil and criminal trials — factual questions involving a brief span of time such as who ran the red light, who was negligent, or who fired the shot. Those factual questions may be very difficult and complex, particularly in a

46. Howard R. Birnbach, *Reasons for Reinstating the Death Penalty*, N.Y. L.J., Dec. 28, 1994, at 2. Birnbach is a former assistant district attorney in the Bronx.

47. 115 S. Ct. 851 (1995).

homicide case where there is only circumstantial evidence as to who may have committed the crime.

But those questions pale in comparison to the far more complex, disturbing, and unanswerable moral question of whether to condemn a fellow human being to death. The answer to that question requires consideration not of a few minutes or days, but of the entire life and being of an individual. Yet juries, upon returning from the often exhausting and emotionally draining task of reaching a verdict on guilt, must take on the even greater question of life or death. It has proven to be an unmanageable undertaking. The courts have failed completely in providing consistent results when the inquiry is made.

Often the decisions about guilt and punishment are not made in the calm and dispassionate setting that is appropriate for such a grave and important decision. Capital cases are often tried in the midst of the passions of the moment. Interracial crimes usually produce more news coverage and more community outrage. The community is upset and people are calling for blood. Often, the prosecutor is exploiting the case for political gain. The state's case may rest on the testimony of suspects in the same or other crimes who have every reason to lie or embellish their stories in order to get better treatment for themselves. The defendant may receive only token representation from a lawyer who would prefer to be doing anything else. Even though the stakes are the highest and the need for a fair, reliable, and objective determination is the greatest, this is not when the legal system functions the best.

In the war on crime, our courts and our society are becoming increasingly indifferent to death and to injustice. Jesse Jacobs was executed in Texas after being sentenced to death at a trial in which the prosecutor asserted that Jacobs had fired the fatal shot that killed the victim. However, after obtaining a conviction and the death penalty, the prosecutor changed theories and asserted that Jacobs' sister killed the victim. The prosecutor even called Jacobs to testify against the sister. The prosecution renounced the theory under which it obtained the death penalty for Jacobs, and then used this testimony to convict his sister. But the State successfully argued that Jacobs should still be executed, even though

under Texas law if the killing was not deliberate he would not be eligible for the death penalty.⁴⁸

This indifference to death, to inadequate counsel, to racism, to the possibility of error, and to other injustices is an enormous price for society to pay for capital punishment.⁴⁹ And society is getting nothing in return. If all of the men, women and children on death row in this country — over 3000 — were executed tomorrow, the streets in Atlanta, Los Angeles, San Francisco, and Dallas would not be any safer than they are tonight. The problems of racism, poverty, lack of education, and lack of opportunity would still be there. And so long as those problems remain, there will be crime in America.

VII. THE ABSENCE OF LEADERSHIP

At a time when there is a need to be concerned about the fairness and integrity of the judicial system and the survival of the Bill of Rights, there is a remarkable lack of leadership in the land and a lack of meaningful debate about the importance of the integrity of the court system.

It was not always this way. When *Gideon v. Wainwright*⁵⁰ was before the U.S. Supreme Court, the attorney generals of Minnesota, Massachusetts and twenty-two other states filed an amicus curiae brief in support of Clarence Earl Gideon, the indigent person seeking counsel. They recognized that the adversary system did not work when one side was deprived of counsel.

When he was Attorney General, Robert Kennedy secured passage of the Criminal Justice Act to provide representation to poor people accused of crimes in the federal courts. Today, however, the associations of state attorneys general and district attorneys and the U.S. Department of Justice oppose even the most token efforts to improve the quality of counsel in capital cases.

48. *Jacobs v. Scott*, 115 S. Ct. 711 (1995) (Stevens, J., dissenting).

49. Various studies have also concluded that the death penalty is carried out at enormous financial cost as well. The most recent study by professors at the Terry Sanford Institute of Public Policy at Duke University found that it costs \$163,000 more for North Carolina to impose the death penalty on a case than to incarcerate a defendant for 20 years. PHILLIP J. COOK & DONNA B. SLAWSON, *THE COSTS OF PROCESSING MURDER CASES IN NORTH CAROLINA* (1993).

50. 372 U.S. 335 (1963).

A rare bit of leadership was provided recently by the district attorney of Manhattan, Robert M. Morgenthau, who wrote an article in the *New York Times* in which he urged New York not to adopt the death penalty. His plea, as one who had spent a career in law enforcement, was that enacting a death penalty statute would be a grave mistake. He revealed the secret that prosecutors often share only among themselves — that the death penalty actually hinders the fight against crime. He wrote:

Promoted by members of both parties in response to an angry populace, capital punishment is a mirage that detracts society from more fruitful, less facile answers. It exacts a terrible price in dollars, lives and human decency. Rather than tamping down the flames of violence, it fuels them while draining millions of dollars from more promising efforts to restore safety to our lives.⁵¹

Morgenthau pointed out that when he became the district attorney of Manhattan, the rate of homicides was twice what it is in Manhattan today. It had declined without the death penalty.

What is so troubling is how seldom this secret is revealed. I hear the same thing from judges and district attorneys who agree — in private — that the death penalty does not work, that it is racist, that the quality of the legal representation is a disgrace, and that the system is not accomplishing anything. Yet, in public, they are unwilling to admit that the emperor wears no clothes. The consequences of going against the prevailing winds may be too great. But such silence is not appropriate. It is a failure of leadership by those who have been trusted with positions of authority.

Instead of a discussion of the difficult and complex problems that confront our society, the political leadership in Washington has found some very odd scapegoats for America's ills. I know many of those who are scapegoats — people who are homeless, people who are poor, people who are accused of crimes. Yet I do not know of one homeless person who is responsible for the failure of a savings and loan. I do not know a single child or mother on welfare who has moved a plant to Mexico.

51. Robert M. Morgenthau, *What Prosecutors Won't Tell You*, N.Y. TIMES, Feb. 7, 1995, at A11.

I have represented people who committed some heinous crimes; there is no question about that. But the harm that they did, great and tragic and indefensible as it has been, has not been as great as some of the harm done to millions of people by those who have dumped hazardous waste, those responsible for pollution, and those who have failed to provide safe working conditions for their employees.

There is a great deal of talk in Congress today about state's rights, about returning power to the state. Those of us in the South know about state's rights. We know what it means. In Georgia, the Confederate battle flag was adopted as the state flag in defiance of *Brown v. Board of Education*.⁵² The state flag stands for defiance of the United States Supreme Court and the proposition that black children are entitled to the same kind of education as white children. The Confederate battle flag — this symbol of defiance of the federal government and equal protection of the law — is displayed today in Georgia's courtrooms. It is a symbol of state's rights. We also know Strom Thurmond. Strom Thurmond ran for president as a Dixiecrat in 1948 — for state's rights, for segregation, for keeping people in "their place."⁵³ So when Strom Thurmond talks about state's rights, we know what he is talking about. Strom Thurmond has not changed; the rest of the country is changing to become more like the South. But there is much unfinished business in America that will never be accomplished without the involvement of the federal government.

No one in leadership in this country today is asking the great political and moral question of our time: are we going to provide the same helping hand to the children of America that we provided to the Chrysler Corporation, to the savings and loans that failed, and to Mexico to protect American investments there?

The question is not being asked, but it is being answered. The answer from Speaker Newt Gingrich and so many others is the same answer Ebenezer Scrooge gave in Charles Dick-

52. 347 U.S. 483 (1954) (holding that racial segregation in public schools violates the Equal Protection Clause of the Fourteenth Amendment); *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (requiring the desegregation of public schools to proceed "with all deliberate speed").

53. NADINE COHODAS, *IN DIXIELAND, HE TOOK HIS STAND, STROM THURMOND AND THE POLITICS OF SOUTHERN CHANGE* (1994).

ens' classic, *A Christmas Carol*: "Are there no prisons, are there no workhouses, are there no orphanages?"

VIII. THE CHALLENGE PRESENTED BY THIS INDIFFERENCE

What are you going to do about it? I want to encourage law students and lawyers to use your talents to help those who most need it — people facing the death penalty, immigrants, people who are poor, people of color and those who are on welfare. It is going to be increasingly difficult to protect the rights of those people, but that is what makes it even more important for you to respond to these needs. If nothing else, we can bear witness to the injustices these people suffer and call our fellow Americans out of their indifference.

The death penalty is gaining popularity and momentum. More states are adopting the death penalty and more executions are being carried out. The federal government will soon join the grisly business of killing people. Although I have no doubt that the United States will someday join the rest of the industrialized world in abandoning capital punishment, that day is not in the near future. But, like those who worked on the underground railroad before the abolition of slavery, we can use our energy and talents to provide safe passage to people one at a time. You can provide the care, the competence, the dedication and the hard work that is so often missing in the representation provided those facing the death penalty.

Unlike the death belt states of the South where there are no public defender programs, there are many outstanding public defender offices here in California. Young lawyers can go to those offices and provide good representation to poor people accused of crimes. There is a tremendous need for people to come to the South and provide representation.

Why did you go to law school? Many go to law school to represent the poor and the powerless, to fight for civil and human rights, and to make the world a better place. But, unfortunately, by the time of graduation many law students lose their way due to the temptation of money, power and prestige that is so easily available to one who has a law degree or perhaps just the temptation to take the path of least resistance.

Reverend John Flynn has observed, "The choice you must make is which suffering to avoid; the suffering that love demands and that brings peace, or the suffering that comes

from emptiness."⁵⁴ A life in the legal profession can provide great material wealth, but also a great deal of emptiness if one remains silent and remains indifferent.

I leave you with the challenge issued by Justice Thurgood Marshall, six months before he died, in accepting the Liberty Bell Award in Philadelphia. Justice Marshall was frail. He was in a wheelchair. But by the end of his remarks, it was observed that "his voice was as booming as [it had been] in those magnificent times when he argued before the Supreme Court."⁵⁵ Justice Marshall said:

I wish I could say that racism and prejudice are only distant memories . . . and that liberty and equality were just around the bend. I wish I could say that America has come to appreciate diversity and to see and accept similarity. But as I look around, I see not a nation of unity but of division — Afro and white, indigenous and immigrant, rich and poor, educated and illiterate . . .

Look around. Can't you not see the tensions in Watts? Can't you feel the fear in Scarsdale? Can't you sense the alienation in Simi Valley? The despair in the South Bronx? The rage in Brooklyn?

We cannot play ostrich. Democracy cannot flourish among fear. Liberty cannot bloom among hate. Justice cannot take root amid rage. We must go against the prevailing wind. We must dissent from the indifference. We must dissent from the apathy. . . . We must dissent from a government that has left its young without jobs, education or hope. We must dissent from the poverty of vision and an absence of leadership. We must dissent because America can do better, because America has no choice but to do better. Take a chance, won't you? Knock down the fences that divide. Tear apart the walls that imprison. Reach out; freedom lies just on the other side.⁵⁶

54. *Diary of an Urban Priest*, N.Y. TIMES, Nov. 27, 1994, § 13, at 1.

55. A. Leon Higginbotham, Jr., *Justice Clarence Thomas in Retrospect*, 45 HASTINGS L.J. 1405, 1430 (1994).

56. CARL T. ROWAN, *DREAM MAKERS, DREAM BREAKERS; THE WORLD OF JUSTICE THURGOOD MARSHALL* 453-54 (1993).